

**Tricil Environmental Management, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO.** Cases 26-CA-13941, 26-CA-14038, 26-CA-14066, and 26-RC-7290

August 31, 1992

# DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case<sup>1</sup> present issues regarding whether the Respondent, in the context of a union organizing campaign, made threats of plant closure, disciplined and discharged union activists because of their union activities, and disparately applied disciplinary procedures to employees in the department where the union organizing campaign began.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

<sup>1</sup> On February 28, 1992, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (195), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although the judge did not cite *Wright Line*, 251 NLRB 1083 (1980), we are satisfied that he applied the standards of that case and did so correctly.

<sup>3</sup> In affirming the judge's rationale for setting aside the August 10, 1990 election, we disavow that portion of his rationale which relies on the discharge of Cellus Perry, which, although unlawful, occurred on September 13, 1990, after the election. We further note that following the resolution of four challenged ballots, the Regional Director opened and counted these ballots, and that the resulting revised tally indicated the Union did not receive a majority of the ballots cast, including three nondeterminative challenged ballots.

In its exceptions the Respondent contends that because of a company reorganization and reduction in force in February and March 1991, discharges of Cellus Perry and Leon Smith should not be reinstated and their backpay should cease as of March 14, 1991. We leave this determination to the compliance stage of the proceeding. The Respondent further contends that a second election would be "ineffective and inappropriate." We leave this issue for resolution by the Regional Director in the representation case. Accordingly, we find it unnecessary to pass on the General Counsel's motion to strike these portions of the Respondent's brief.

orders that the Respondent, Tricil Environmental Management, Inc., Millington, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[Direction of Second Election omitted from publication.]

*Melvin Ford, Esq.*, for the General Counsel.

*Richard J. Morgan, Esq.* and *Richard D. Ries, Esq. (McNair Law Firm, P.A.)*, of Columbia, South Carolina, for the Respondent.

*Hugh A. Jacks*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon an original charge filed in Case 26-CA-13941 on July 13, 1990,<sup>1</sup> (amended on October 1 and 5), an original charge filed in Case 26-CA-14038 on August 30 (amended on October 1), and an original charge filed in Case 26-CA-14066 on September 17, the Regional Director for Region 26 of the National Labor Relations Board issued a complaint on October 10 which consolidated the above unfair labor cases for trial and alleged that Laidlaw Environmental Services, Inc. and Tricil Environmental Management, Inc., co-owners, had engaged in conduct which violated Section 8(a)(1) and (3) of the National Labor relations Act. The named Respondents filed timely answer denying they had engaged in the unfair labor practices described in the complaint. Thereafter, on February 13, 1991, Case 26-RC-7290 was consolidated with the unfair labor practice cases for trial thereby placing Petitioner's Objections 1-4, 6, and 11 before me for resolution.

The cases were heard at Memphis, Tennessee, on various dates during the period February 19 through March 20, 1991. At the outset of the hearing, General Counsel amended the complaint by deleting Laidlaw Environmental Services, Inc. as a named respondent and removing that entity's name from the case caption. Additionally, General Counsel amended paragraph 13 of the complaint by designating the original paragraph to be paragraph 13a, and by adding paragraph 13b, which alleged, in substance, that Respondent, through Chris Harpell, unlawfully threatened employees with plant closure on May 22 and 25, 1990, if they selected the Union as their bargaining agent.

On the entire record, including careful consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Tricil Environmental Management, Inc., a Tennessee corporation (the Respondent), maintains an office and place of business in Millington, Tennessee, where it processes (blends) fuel and consolidates materials (used chemicals) for either sale as fuel to cement kilns or for landfill. It annually sells goods and materials valued in excess of \$50,000 to cus-

<sup>1</sup> All dates herein are 1990 unless otherwise indicated.

tomers located outside the State of Tennessee, and it annually purchases goods and materials valued in excess of \$50,000 directly from points located outside the State of Tennessee. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Summary of the Complaint Allegations

Summarized, the denied allegations of the complaint allege, in substance, that Respondent violated Section 8(a)(1) of the Act during the period extending from May 22 to August 17, 1990, by: unlawfully interrogating employees regarding their union activities and sentiments; threatening employees with loss of benefits, more stringent enforcement of rules, and plant closure if they select the Union as their bargaining representative; creating the impression that the union activities of employees were under surveillance; and unlawfully soliciting employee grievances. Additionally, the complaint alleges that Respondent violated Section 8(a)(3) of the Act by: disciplining named employees on various dates during the period May 29 through August 28, 1990; terminating employees Leon Smith and Donald Whitney on July 10, 1990; and by terminating employees Antonio D. Hill, Antonio J. Hill, Cellus Perry, Stanley Hill, Curtis Wright, and Charles Morse on September 13, 1990.

### B. Background

The Millington, Tennessee facility involved in this proceeding has experienced several changes in ownership in recent years. Prior to 1989, the facility was owned by Earth Industrial Waste Management. In September 1989, Tricil Waste Management, Inc., a wholly owned subsidiary of Tricil, Inc., purchased the property. Thereafter, in January 1990, Laidlaw Investments, a wholly owned subsidiary of Laidlaw, Inc., purchased the stock of Tricil, Inc.

During relevant periods, Respondent employed approximately 100 employees at the Millington facility. Those employees engaged in the blending of various waste products with fuel which was then sold as fuel for cement kilns or for landfill. While Earth Industrial operated the facility, it handled about 600 containers per week. During the summer of 1990, the volume increased to approximately 1500 drums per week.

At various times during calendar year 1990, John Peeples, Lynn Shreve, Carter Gray, and Charlie Bodanza had overall management responsibility at the facility. In addition to them, other supervisors who satisfied the criteria of Section 2(11) of the Act were: Willie Thomas, process manager; Kevin Whaley, inventory manager (until June 2, 1990); Don Tyson, controller; Billy Arrington, Rick Timmons, and Chris

Harpell, inventory foremen; and Carter Grey, manager of safety and regulatory compliance.<sup>2</sup>

A substantial number of employees were hired at the facility when the volume of business increased in 1990. Alleged discriminatees hired in January 1990 included Leon Smith, Cellus Perry, Antonio D. Hill, and Curtis Wright. All new hires attended a 3-day orientation period which included instruction regarding Respondent's operations, and instruction on Respondent's policies and procedures, including attendance and discipline. With respect to attendance, employees were informed they were to notify their supervisor 15 minutes before their scheduled worktime if they were to be tardy, and they were requested to give 24 hours advance notice if they intended to be absent from work. With respect to discipline, the record reveals the progressive system entailed a verbal warning, a written warning, a 3-day suspension, and discharge.

### C. The Union Campaign and the Board-Conducted Election

Employee Leon Smith indicated during his testimony that he and other employees discussed the possibility of obtaining union representation during April, and those discussions caused him to contact Union President Jeff Woods on May 1. Thereafter, Smith was put in contact with an individual named Arthur Maxwell, and plans for an organization drive were formulated. Smith testified that they started setting up meetings about the middle of May with the aim of following procedures which would enable the Union to file a petition to organize the plant. Union meetings were scheduled to be held on Saturdays, and Smith testified he secured a union hall where the meetings could be held, and he prepared handwritten literature to inform employees of meeting dates and everything they were doing in organizing the Union. While Smith and several other employees testified they placed union-related literature on the employee bulletin board at the plant, and illustrative examples of the material posted were placed in the record as General Counsel's Exhibits 7(a) and (b), the documents are undated and the record fails to reveal precisely when they were placed on the bulletin board.

The petition was filed in Case 26-RC-7290 on June 25.<sup>3</sup> The unit sought was:

All production and maintenance employees, including process operators, warehousemen, laboratory technicians, material inspectors, maintenance technicians, and truck drivers employed at the Employer's facility at Millington, Tennessee, excluding all office clerical employees, section leaders, professional employees, guards and supervisors as defined in the Act.

<sup>2</sup>At the time of the hearing, Whaley, Tyson, Timmons, and Harpell were no longer employed by Respondent. Gray was employed when the hearing commenced in February 1991, but was employed elsewhere when he was recalled to give testimony during the presentation of Respondent's case in March 1991.

<sup>3</sup>General Counsel's posttrial motion which requests that I admit report on challenges and objections issued by the Regional Director in the representation case on October 16, 1990, and the Board's Decision and Direction, which issued on February 6, 1991, in evidence is hereby granted. The former document is designated ALJ Ex. 1; the latter ALJ Ex. 2.

An election was conducted at the facility pursuant to a Stipulated Election Agreement on August 10. Approximately 62 employees were eligible to vote; 27 cast votes for Petitioner; 28 cast votes against Petitioner; and 7 challenged ballots were cast.

The Union filed objections to the conduct of the election and on October 16 the Regional Director for Region 26 issued Report on Challenges and Objections in Case 26-RC-7290. With respect to the challenges, he recommended that challenge of the ballots of four employees (Ninette Parrish, Karen Ray, Lisa Kern, and Dawn Lowery) he overruled; that the challenge of the ballot of employee Pipkin he sustained; and that the ballots of John Washburn and Leon Smith he decided on the basis of testimony in event they remained determinative after the ballots of the four above-named employees were opened and counted. With respect to the objections, the Regional Director recommended that Objections 5-7 and 9-10 be overruled, and that Objections 1-4, 6, and 11 be consolidated for hearing with Cases 26-CA-13941 and 26-CA-14038. By Decision and Direction dated February 6, 1991, the Board adopted the Regional Director's findings and recommendations.

The objections before me for resolution are, with exception of Objection 6, coextensive with allegations set forth in the complaint. Thus, Objection 1 is coextensive with paragraphs 15 and 16 of the complaint; Objection 2 is coextensive with paragraphs 14 and 16 (period June 25-August 10 only); Objection 3 is coextensive with paragraphs 7a, b and c; Objection 4 is coextensive with paragraphs 9 and 13; and Objection 11 is coextensive with paragraph 8. Paragraph 6 is as follows:

That immediately prior to said election the Employer, through its agents, officers and representatives engaged in unfair labor practices by the act of holding "impromptu captive audience" meetings within 24 hours of conduct of ballot, which conduct interfered with and restrained the employees in their free choice of a bargaining representative.

#### *D. The Alleged 8(a)(1) Violations*

The complaint alleges, and General Counsel contends, that Respondent engaged in conduct which violated Section 8(a)(1) during the course of the organization campaign. Four Respondent supervisors, who are admittedly statutory supervisors (Willie Thomas, Charlie Bodanza, Don Tyson, and Rick Timmons) are alleged to have engaged in unlawful conduct. The allegations are discussed individually below.<sup>4</sup>

#### *Alleged Unlawful Conduct by Willie Thomas*

1. Paragraph 7(a) of the complaint alleges, in substance, that Thomas threatened employees with plant closure if they selected the Union as their bargaining representative on July 10.

General Counsel sought to prove the allegation through testimony given by employee Larry Porterfield. Porterfield testified that, about the second week in July, he and Willie

Hunt, Gregory Allen, and Willie Murrell were conversing with Supervisor Willie Thomas about high school and after he and Thomas both indicated they had gone to Manassas High School, Thomas asked him "did I know what happened to the plants around Manassas." The employee claims he replied they probably moved away to a town that paid less money and Thomas said "No, they closed because of union activity . . . that's probably gonna happen here." Porterfield claims Thomas then asked him if he was scared for his job, stating he was scared for his. The employee claims the conversation ended with him stating "No, I'm not scared."

While employee Willie Murrell appeared as a witness and was asked to describe his union-related conversation with management during the organization campaign, he made no mention of a breakroom conversation with Supervisor Thomas.

Thomas indicated during his testimony that he made comments about plant closings on one occasion while he was in the breakroom, but he claimed his conversation was with one of his supervisors rather than with any employee. He testified that a poster had been placed on the bulletin board which depicted a Greenpeace person standing in front of a closed plant and he commented to the unspecified supervisor that places like Firestone and International Harvester had unions and they did not do anything to help the employees keep their jobs because they could not remain competitive and that the Greenpeace guy depicted in the posted was fulfilling his mission to close down the plant.<sup>5</sup>

Respondent urges me to credit Thomas rather than Porterfield, in part because employee Murrell failed to corroborate Porterfield's testimony. Noting that Thomas did not refute Porterfield's claim that they both attended Manassas High School, and the further fact that Thomas did not seek to directly refute Porterfield's testimony, I am not inclined to credit Thomas as urged. I credit Porterfield who appeared to be seeking to state his best recollection of a conversation he had with Thomas in the breakroom. I find that Respondent, through Thomas, violated Section 8(a)(1) in mid-July by threatening employees with plant closure if they selected the Union as their bargaining agent.

2. Paragraph 7(b) of the complaint alleges that on July 24, in separate incidents, Willie Thomas threatened employees with plant closure.

General Counsel sought to prove the allegation through testimony given by employees Willie Murrell and A. J. (Little Antonio) Hill.

The record reveals that Greenpeace, a conservation group, demonstrated outside of Respondent's facility on July 24. Using sound amplifiers, the Greenpeace group claimed that the facility was improperly licensed and should be shut down. A union representative expressed the Union's concurrence with Greenpeace's objectives.

Murrell testified that, when he entered Respondent's parking lot shortly before his 2 p.m. reporting time, on the day Greenpeace demonstrated at the facility (July 24), Willie Thomas walked up to him and the following conversation occurred:

He asked me, when I came up, he asked me how am I doing. I said "okay." He asked me how did I feel

<sup>4</sup> At the conclusion of his case-in-chief, General Counsel was permitted to delete paragraphs 7(e), 10, 11, and that portion of paragraph 7(d) dealing with the allegation of surveillance from the complaint.

<sup>5</sup> The poster was placed in the record as R. Exh. 39.

about the union, and he asked me did I know what happened to International Harvester and Firestone, and I told him, "No." Then, he went on to say they closed, and if I voted for the Union, Tricil would close, if the Union got in.

Murrell stated the conversation lasted 2–3 minutes and he testified the Greenpeace group was already at the site at the time.

Hill testified that, on the day Greenpeace picketed, Thomas came to the dock and told him the Company would close if the Union came in. The employee could not recall anything else being said.

Thomas generally denied that he told any employee Respondent would close if employees selected the Union to represent them. With specific regard to July 24, Greenpeace day, he recalled that after hearing a Greenpeace spokesman state Greenpeace desired to cause the facility to be closed, he asked employee Jarvis Hudson in the decontamination trailer if he had heard what the Greenpeace guy said; that he said he wants to shut the place down. Thomas claims the entire second shift was present at the time. He testified he never spoke with Murrell individually about International Harvester or Firestone. Thomas did not specifically deny conversing with Hill at the dock on July 24.

Respondent accurately observes that all witnesses except Murrell indicated the Greenpeace group arrived at the site at 4 or 5 p.m. on July 24. As Murrell testified that group was at the site prior to 2 p.m., it urges me to credit Thomas rather than Murrell. While it may well be that Murrell incorrectly recalled that the Greenpeace group was at the facility prior to 2 p.m., Thomas simply denied indirectly that he engaged in conversation with Murrell on July 24. The employee described the conversation convincingly and I credit him. Moreover, I credit Hill as Thomas failed to deny he conversed with Hill at the dock on July 24.

Having credited the employees, I find that Respondent, through Thomas, violated Section 8(a)(1) on July 24 by threatening plant closure if employees selected the Union as their bargaining representative.

3. Paragraph 7(c) of the complaint alleges that Willie Thomas threatened employees with plant closure if they selected the Union as their bargaining agent on August 6.

General Counsel offered no testimony to prove the allegation. Accordingly, I recommend that paragraph 7(c) of the complaint be dismissed.

4. Paragraph 7(d) of the complaint alleges that Willie Thomas interrogated an employee about his union activities, sympathies and desires in late July or early August. General Counsel sought to prove the allegation through the testimony of employee A. J. (Little Antonio) Hill.

Hill testified that when Willie Thomas and Don Tyson, Respondent's Controller, were conducting one-on-one meetings with employees to discuss their entitlement to vacation pay, he met with them. He testified that after Tyson informed him of the vacation pay he was entitled to receive, Thomas asked him how he was going to vote for the Union. The employee claims he responded by asking if he had to vote for a union; if he had to be a part of it. He claimed he recalled nothing further.

Tyson, who had been terminated by Respondent prior to the time he appeared to testify, denied that Hill was asked

how he would vote in the election when he and Thomas discussed vacation pay with him. Similarly, Thomas denied that he asked the employee how he would vote in the election.

Tyson was an impressive witness and he appeared to have no motive for slanting his testimony. Noting that A. J. Hill was the only employee who claimed he was interrogated about his union sentiments during the insurance one-on-one meetings, and the fact that Tyson and Thomas carefully indicated while discussing vacation pay with employees that the decision to pay them the vacation moneys Tricil owed them had nothing to do with the union situation, I credit Tyson's and Thomas' claim that Hill was not asked how he would vote during the incident under discussion. Accordingly, I recommend that paragraph 7(d) of the complaint be dismissed.

5. Paragraphs 8 and 13(a) of the complaint allege that Charlie Bodanza unlawfully solicited employee complaints and grievances and promised employees increased benefits and improved conditions of employment on or about the second week of July. General Counsel caused employees Antonio D. Hill, Larry Porterfield, and Curtis Wright to describe conversations they had with Bodanza in mid-July.

Hill testified that, when he met with Bodanza in the latter's office in July, Bodanza asked him what he disliked about the Company. Hill replied that he thought a lot of things were unsafe and unfair. He recalled that Bodanza stated he wanted the employees to give him a chance to prove himself, and that things were going to change.

Porterfield testified that when he met individually with Bodanza in July, that Bodanza asked him his name, and told him his. He recalled Bodanza then stated it was just a meeting to get to know employees, and to let them get to know him. Porterfield testified Bodanza then asked what he could do to make the Company better, and he replied give more money. The employee indicated Bodanza then asked what he could do to improve the Company, and that, after he (Porterfield) told him he did not know much about that, Bodanza concluded the meeting by saying he would probably be meeting more with employees.

According to Porterfield, Bodanza met with second shift employees in mid-July. He testified that during the meeting, Bodanza related a personal experience wherein he had previously been employed as a press operator at a printing company. According to Porterfield, Bodanza told them the employees at the Company obtained union representation; that negotiations failed to produce an agreement; that the employees went on strike for about 4 months; that they then resumed negotiations; that they struck another 6 months; that negotiations were unsuccessful; that, when they eventually went back to work, they took less money than they bargained for at first; and that the plant closed after a year or so later because other businesses were getting their business. Porterfield testified that Bodanza ended the story by saying that's what happens when you have a union; that we don't need one, and we ain't gonna have one.

Curtis Wright claimed during his testimony that he had two one-on-one conversations with Bodanza in July, and that he attended one group meeting at which Bodanza spoke.

At the first one-on-one meeting, Wright testified that after Bodanza told him he would like to be given a chance to turn the Company around, he said, if given a chance, we would be given better conditions and more money—we would even-

tually be reaping the benefits of all the money that was being saved.

Wright testified he next had a one-on-one conversation with Bodanza about a week or two after the first meeting. He testified that after Bodanza stressed that he would be on the opposite side of the table if the Union was voted in, Bodanza again stressed that he wanted a chance to turn the Company around, indicating that better money and working conditions would eventually come.

The third meeting, attended by third shift employees at the beginning of the shift on Greenpeace day (July 24), was held in the breakroom. Wright testified Bodanza brought a piece of paper to the meeting which listed money saving improvements he had made at the facility. The employee claimed that after referring to the money saved as the "bottom line," and commenting that money would be used to make more improvements and money which would eventually fall down to employees, Bodanza tore the paper up stating that if the Union is voted in, we can forget this.

Prior to causing Bodanza to describe his one-on-one and group meetings with Respondent's employees, Respondent's counsel adduced considerable accrediting testimony through Bodanza. Thus, this management official, who reported to the Millington facility on July 11, testified that he gained considerable experience as a manager by working for Litton Industries for 26 years. He indicated that during 20 of those years he served in a supervisory or management position, and that at regular intervals he attended programs which emphasized communication, labor and employment training. While with Litton, he claimed they stayed union free at a South Carolina location for 17 years by practicing open door communication with employees and by refraining from threatening, interrogating, promising, or spying on people.

Bodanza testified that when he came to the Millington facility in July 1990, his assignment was to work with the operational people to turn the operation around. He recounted the various cost cutting measures he took, and indicated that he held one-on-one and group meetings with employees to tell them what he had done, and to get acquainted with them and let them get to know him.

Bodanza's recollection was that he first met with a group of employees on July 24, the day Greenpeace demonstrated. He testified the message he imparted on that occasion was that no one was going to close them down; that they all had a job to do; they were going to do it together; and there was no reason they should be closed down.

According to Bodanza, during his second meeting with employees, he described a personal experience he had gone through while he was a nonsupervisory employee at a South Carolina Litton facility. His description of the experience tracked the account given by employee Porterfield as set forth above. Bodanza added that he prefaced his remarks with a statement that what he was going to relate would not necessarily occur at the Millington facility, and he indicated that during the meeting he informed employees what they were doing, how they were doing it, and informed them they had to pull together to stem the decline of business and help make the profits they needed to make.

Bodanza testified his final meeting(s) with employee groups occurred shortly before the election. He indicated he once again discussed the bottom line—where they were at the time, and the progress they had made—with employees.

He indicated he referred to the coming election at which they would vote whether they were going with the Company or the Union, and he told them he would love to continue to work with them as a team member to get things done rather than sit on the opposite side of the table and negotiate their contract.

When asked if he told the people during any meetings that they would get better benefits and wages if the Union did not get in, Bodanza answered: "Absolutely not." Similarly, he testified he did not tell employees they would get better working conditions if the Union did not get in.

General Counsel contends in his brief that Respondent, through Bodanza's conversations with individuals and groups of employees, violated Section 8(a)(1) as he: stated his opposition to the Union; asked employees how they felt about the Company and asked what he could do to improve it; and asked the employees to give him 6 months to improve benefits, conditions, and money. As noted above, the three witnesses who described their one-on-one or group meetings with Bodanza claim, variously, that they told Bodanza they would like to see improvement in working conditions, safety, and wages. The record fails to reveal that Bodanza expressly promised to grant any wage increase, any specific safety improvement, or any specific improvement in employee working conditions. Instead, his technique during the one-on-ones and during the group meetings was to emphasize corrective steps he had taken to make Respondent more profitable, and to encourage employees to give him additional ideas which would lead to further improvement of the Company. Noticeably, the record fails to reveal that Bodanza indicated at any time that employees would be rewarded if they refused to support the Union. Instead, he indicated their lot would improve if they cooperated with him and improved Respondent's operations.

In sum, I am convinced that Hill, Porterfield, and Wright recited during their testimony conclusions they reached after meeting with Bodanza. I am not convinced by their testimony that Bodanza expressly or impliedly promised them a wage increase, better benefits or improved working conditions if they abandoned their support of the Union. I credit Bodanza's denial that he engaged in the conduct attributed to him. Accordingly, I recommend that paragraphs 8 and 13(a) of the complaint be dismissed.

6. Paragraph 9 of the complaint alleges that on or about August 3 Willie Thomas and Don Tyson threatened employees with loss of benefits if they selected the Union as their bargaining representative. General Counsel sought to prove the allegation through testimony given by Willie Murrell.

Murrell testified that, when he, Don Tyson, and Willie Thomas were in Thomas' office a week before the election, Tyson told him he wanted him to vote "no" in the election, and that if the union came in: "I would have to pay for—I might lose my insurance." During cross-examination, Murrell agreed he was told during the meeting under discussion that a contract would have to be negotiated if the Union came in; that benefits could go up and they could go down. He insisted, however, they told him that he would lose some benefits, and that he would have to pay for some of them.

The record reveals that Laidlaw and Tricil's vacation plans differed, and in early August Tricil employees who had earned vacation benefits in 1989, but had not received them,

were paid for their accrued vacation to enable Laidlaw to institute its vacation plan.

Tyson, corroborated by Thomas, testified that all employees who were due vacation pay were called to the office where he and Thomas discussed their vacation pay entitlement. During the individual sessions, each employee was given a copy of a so-called affidavit which was placed in the record as Respondent's Exhibit 40. The affidavit contained Union Representative Arthur Maxwell's name, and set forth some nine items the affiant would guarantee if the Union won representation rights, i.e., automatic wage and benefit increases, a pledge that there would never be a strike, etc. Tyson testified the affidavit provoked some employees to ask questions and that when such questions involved an inquiry about pay or benefits in event of a union victory, he explained to employees that a contract would have to be negotiated and everything was negotiable; that some benefits may go up, and some might go down. He forcefully denied that he told Murrell or any other employee that they would lose insurance or other benefits, or that they would have to pay for their own insurance if the Union was voted in.

In sum, Murrell appeared somewhat confused when he testified about the meeting under discussion. On the other hand, Tyson, who was no longer employed by Respondent at the time of the hearing impressed me as being an impartial witness who testified in a clear, convincing manner. I credit his claim that he merely described the negotiation process to Murrell, rather than informing the employee he would lose insurance or other benefits if employees selected the Union as their bargaining agent. Accordingly, I recommend that paragraph 9 of the complaint be dismissed.

7. Paragraph 12 of the complaint alleges that on August 9 Willie Thomas threatened employees with plant closure if they selected the Union as their bargaining agent. General Counsel sought to prove the allegation through the testimony of William Murrell.

Murrell testified that he went into Willie Thomas' office the day before the election, and that Thomas stated in the presence of Percy Wooddears, Patrick Miller, and himself that he did not want us to vote for the Union. After the employee stated that was all he could recall being said, General Counsel asked: "Did Mr. Thomas make any comments regarding what might happen if employees voted for the Union?" After asking counsel to repeat the question, Murrell stated: "Yes, he said the plant would close if the union came in."

With respect to the August 9 incident, Thomas indicated that, at the start of their shift, employees Murrell, Miller and Wooddears appeared unsolicited at his office and they stated to him: "This thing is really going crazy, I can't even rest at home, they're coming over to my house at night, they're calling me at home. What can I do?" He claims he told the employees to hang in there; this thing will be over tomorrow. He denied he said anything about plant closure at the meeting.

Thomas was the more impressive witness and I credit his version of the above-described conversation rather than the abbreviated version given by Murrell after the employee had been led by General Counsel. I recommend that paragraph 12 of the complaint be dismissed.

8. Paragraph 13(b) of the complaint alleges that on or about May 22 or 25, Chris Harpell threatened employees with plant closure if the union was selected as their bargain-

ing agent. General Counsel sought to prove the allegation through testimony given by Leon Smith and Cellus Perry.

Smith testified that on May 22, while he, Clifford Roy and Cellus Perry were working on the dock, their foreman, Chris Harpell, told them the plant would close if the Union got in, and that if the Union did get in the Company would listen to a Union, but they would not have to deal with the Union.

Perry testified that around the May 25, as he was walking from the pad to go to a meeting the Company had called, Harpell came out of the operations trailer and told him the guys should wait a couple of months before deciding to get a union "because if y'all get a union, we'll probably close down or move."

While Harpell was called as a witness by General Counsel, he was asked no questions about the alleged plant closure threats attributed to him by employees Smith and Perry. Consequently, the above-described testimony given by the employees stand unrefuted. In the circumstances described, I find that Respondent, through Foreman Harpell, threatened employees with plant closure if they selected the Union As their bargaining agent on May 22 and May 25, 1990.

#### *E. The Alleged 8(a)(3) Violations*

##### *1. Positions of the parties*

When the union organization campaign was instituted at Respondent, alleged discriminatees Leon Smith, Cellus Perry, Donald Whitney, Antonio D. Hill, Curtis Wright, and Antonio J. Hill were employed in Respondent's inventory department. General Counsel contends the union activities of the named alleged discriminatees caused Respondent to more strictly apply its disciplinary policies in the Inventory Department after it learned its employees were engaged in union activities. Thus, when alleged discriminatees were given verbal warnings, written warnings, 3-day suspensions, and/or were terminated on various dates extending from May to September 13, 1990, General Counsel asserts the discipline administered was unlawful as it resulted from Respondent's decision to "crack-down" on employees in the inventory department because employees were seeking union representation.

Respondent contends the record reveals that a serious absentee problem developed in the Inventory Department prior to the time that it became aware that employees were engaged in union activities. It further contends that the alleged discriminatees were disciplined as they were engaged in conduct which they knew, or should have known, would lead to the discipline imposed upon them. Finally, it contends that alleged discriminatees Leon Smith and Donald Whitney were terminated pursuant to its progressive discipline program, and that the alleged discriminatees terminated on September 13, 1990, were terminated pursuant to an economically motivated consolidation and reorganization plan which, inter alia, resulted in the separation of employees who had the poorest absentee, lateness, and disciplinary records.

##### *2. Protected activities of alleged discriminatees and extent of company knowledge*

Leon Smith, employed on the second shift in Respondent's Inventory Department, indicated that, after he and other employees discussed the desirability of unionizing in April, he contacted Union President Jeff Woods on May 1, 1990, to

indicate the employee's sentiments. Woods put Smith in contact with Union Representative Arthur Maxwell. Thereafter, Maxwell and Smith commenced an effort to organize Respondent's employees. Smith testified that his efforts included: setting up meetings; securing a union hall for meetings; preparing handwritten prounion literature, which he posted on the employee bulletin board at the facility; and keeping employees advised on what he and others were doing. Smith testified without contradiction that, during the organization drive, he received complaints from employees working on all shifts, and he took the problems up with foremen, supervisors, and the plant manager (including Carter Grey).

The record reveals that Smith openly supported the Union and Respondent's management was fully aware of his union advocacy. As found, supra, the employee testified, without contradiction, that his immediate Supervisor Harpell, told him and employees Clifford Roy and Cellus Perry on May 22 that he felt the plant would close if the Union got in. Smith claimed, without contradiction that a second foreman, Billy Arrington, told him and Perry around May 31, that they did not need a union; they needed to give the Company a chance to make things right. Smith testified he and Perry replied by telling Arrington in unison "We have to do what we have to do." In addition to Harpell and Arrington, Smith indicated he had union-related discussions with Inventory Manager Kevin Whaley, Plant Manager Lynn Shreve, and Corporate Representative Richard Familla during the month of June. Thus, he testified: Whaley told him around June 1 that he respected him being a spokesman for the Union; that he later confronted Whaley about making copies of prounion literature; that Shreve told him he respected him for organizing; and that, on June 14, Familla told him he respected him for his activities, but if he should cross the line, he would get rid of him.

Employee Cellus Perry also worked on the second shift in the inventory department. Perry testified that he assisted in the union organization drive by passing out and posting prounion fliers, distributing literature which related to a bargaining agreement the Union had with another employer, and keeping employees advised as to union meetings.

Perry's un rebutted testimony reveals that Foremen Harpell and Arrington were aware of his union sentiments. Thus, he corroborated Smith's claim that Arrington told them around the end of May that they did not need a union; that they needed to give the Company a chance, and he corroborated Smith's version of their plant closure prediction made by Harpell, but he placed the date of the conversation as May 25 rather than May 22.

Employees Antonio J. Hill, Antonio D. Hill, Stanley Hill, and Curtis Wright all testified that they attended union meetings during the organization campaign. Wright and Stanley Hill indicated they wore union buttons and/or union T-shirts to work. Antonio J. Hill testified he rode with and was the constant companion of Smith and Perry; and Antonio D. Hill testified, without contradiction, that he posted union bolster signs in the facilities breakroom. As the employees engaged in union activities openly and/or associated openly with known union advocates, I infer that Respondent management was aware of their prounion sentiments.

Alleged discriminatee Donald Whitney did not attend the hearing, and the record fails to reveal the extent, if any, of

his participation in union or other protected activities. It follows that Respondent has not been shown to have known or suspected that such employee engaged in union or other protected activities. Employee Charles Morse testified he attended several union meetings, but the record fails to reveal that Respondent became aware of his limited participation in union activities.

### 3. Respondent's absence and tardiness policies and its progressive disciplinary system

Carter Grey, then safety and regulation manager at Respondent,<sup>6</sup> and those alleged discriminatees who appeared at the hearing to give testimony described Respondent's absence and tardiness policies as well as its progressive discipline system. Their collective testimony reveals that the absentee policy was one wherein an employer was expected to give notice in advance of his scheduled worktime of expected absence or tardiness. Grey indicated 24-hour notice of anticipated absence was requested and 15-30 minutes notice before scheduled shift start was requested if an employee was to be late. In event an employee was absent from work or was late in arriving at work, his immediate supervisor prepared a Work Missed Report (WMR). The supervisor indicated on the WMR whether the absence or tardy was excused or unexcused. Grey indicated the supervisors considered all the circumstances when making their subjective excused or unexcused decision. Once it was decided that an absence or tardy was unexcused, the employee was subject to discipline. The progressive system entailed: oral warning, written warning, 3-day suspension, and discharge. While excused absences or tardies did not normally subject an employee to discipline, excesses would.

### 4. The discipline of alleged discriminatees during period May 29-August 28, 1990

Paragraph 14 of the complaint read in conjunction with paragraphs 16 and 18, alleges that Respondent imposed indicated discipline on named employees on the dates indicated because they joined or supported the Union, or engaged in other protected activity:

Leon Smith	May 29, 1990, verbal warning June 4, 1990, verbal warning
Cellus Perry	June 4, 1990, verbal warning June 25, 1990, written warning July 9, 1990, three-day suspension
Donald Whitney	June 22, 1990, written warning, three-day suspension
Antonio D. Hill	August 28, 1990, written warning
Curtis Wright	June 13, 1990, written warning June 25, 1990, three-day suspension

<sup>6</sup>Grey was the manager of the Millington facility for 2-3 weeks in July 1990. During that period, he terminated Leon Smith and Donald Whitney and he imposed a 3-day suspension on alleged discriminatee Cellus Perry.

Antonio J. Hill

June 22, 1990, three-day  
suspension

As noted, *supra*, General Counsel contends the above-described discipline was inflicted upon the employees named because Respondent decided, after learning that its employees were engaged in union activity, to more strictly enforce its absence and tardiness policies. General Counsel sought to prove the allegation in main, through the testimony of Cris Harpell and Rick Timmons, former Respondent supervisors in Respondent's inventory department, who were working elsewhere at the time of the hearing.

Cris Harpell was employed by Respondent during the fall of 1989. In January 1990, he was promoted to a foreman position in the inventory department, on the second shift. He testified that when he became a foreman, employee absences from work or tardiness were recorded on a document entitled Work Missed Report. Harpell indicated he checked the appropriate box indicating whether the absence and/or tardy was excused or unexcused, and indicated on the form why he had classified the absence or tardy as excused or unexcused. He turned completed Work Missed Reports into his immediate supervisor, Whaley. Harpell testified that during the early part of his tenure in the foreman position, he did not strictly enforce Respondent's rules and he refrained, on occasion, from writing up employees for being late without calling in, not wearing safety equipment, and absences. He testified that during April and early May he was experiencing attendance problems with employees and Whaley instructed him to more fully document employee rule violations by preparing, in addition, to a Work Missed Report, a writeup which fully explained the circumstances surrounding an absence, a tardy, or other violation of Respondent's rules. Harpell specifically indicated he was told to prepare detailed writeups as well as Work Missed Reports prior to the time that he learned Respondent's employees were attempting to get a union to represent them.

Rick Timmons was employed at Respondent's facility for about 4-1/2 years. When Tricil purchased the facility in late 1989, he was a warehouse foreman. He was promoted to inventory supervisor when Laidlaw took over around April 1990. Timmons indicated that, when the facility was owned by Earth Industrial, employees' absences and failures to report for work on time were not dealt with strictly unless they occurred a lot. He indicated that, after Tricil acquired the facility, they started giving verbal warnings, written warnings, and stuff like that. According to Timmons, his Supervisor Whaley, told him at some point in May before the Company had any knowledge of union activity, that in addition to completing Work Missed Reports when employees were absent, tardy, or violated company rules, he was to prepare a writeup more fully explaining the circumstances of the work missed or rules violation. According to Timmons, frequent absences by employee Donald Whitney, which had resulted in employee complaints, caused Whaley to tell him to be more strict with discipline.

Kevin Whaley, who, like Harpell and Timmons, was no longer employed by Respondent at the time of the hearing, held the title of inventory manager at Respondent from early 1988 until July 2, 1990. He indicated all employee absences and tardies were recorded, whether they were excused or unexcused, on Work Missed Reports only until April 1990. He testified he decided in early April that the Work Missed Re-

ports were not effective as employees would just throw them in the trash when given their copies. To cure the problem, he indicated he started to prepare writeups which expanded on the incidents noted in the Work Missed Reports when absences or tardies were deemed by him and the employee's supervisor to be unexcused. The writeups, as well as the Work Missed Reports, were shown to employees who had experienced unexcused absences and tardies, and such documents indicated the discipline being invoked, i.e., verbal warning for the first offense, written warning for the second offense, 3-day suspension for the third offense, and discharge for the fourth offense. Whaley indicated his foremen continued to prepare Work Missed Reports, but they were busy and he prepared most of the supplemental writeups. Whaley identified writeups involving safety violations by employees A. J. Hill and Darrell Clark which were prepared on April 5, 1990, as examples of the type of writeup which he prepared for inspection by employees and for inclusion in employees' personnel files. (R. Exhs. 21(a) and (b) and 22(a) and (b).) Similarly, he identified a writeup documenting a verbal warning which was given to employee Curtis Wright for unexcused absence on May 7, 1990, as the type of writeup he prepared to document discipline imposed for absenteeism. Whaley testified he decided to use detailed writeups in addition to Work Missed Reports before he learned employees were engaged in union activity at the facility.

In support of Whaley's claim that he was experiencing absentee problems in the inventory department during April and May 1990, Respondent contends in its brief (pp. 37 and 38), that the Work Missed Reports and or writeups documenting absence and tardiness from January 19 through August 8, 1990, reveal there was 1 incident of absenteeism-lateness in January; 3 incidents in February; 4 incidents in March; 11 incidents in April; and 19 incidents in May. My inspection of the exhibits referenced causes me to conclude that the representations made in the brief are accurate.

Having carefully reviewed the testimony given by Harpell, Timmons, and Whaley, and having considered the frequency of employee absences and tardies in Respondent's inventory department during the first 5 months of 1990, I find, contrary to General Counsel, that the testimony and evidence does not reveal that Respondent decided to more strictly enforce its rules and/or policies after learning its employees were engaged in union organizational activity.<sup>7</sup> Nevertheless, I review below the circumstances surrounding the imposition of discipline on the alleged discriminatees to permit resolution of the issues raised.

Leon Smith

May 29, 1990 Verbal Warning

Smith did not report for work at Respondent on May 25, 1990. While the Work Missed Report prepared by Supervisor Billy Arrington (R. Exh. 5) indicates the absence was unexcused because the employee failed to call the facility before the start of his shift to report that he would be absent, Smith

<sup>7</sup> General Counsel offered documentary evidence which reveals the absentee and tardy policies were not as strenuously enforced in other departments. As the record fails to reveal that organizational activity occurred only in the inventory department, such evidence does not support General Counsel's "crack down" theory.

testified he called the facility but did not get an answer. Smith could not recall what time he called on May 25, but claimed that when he reported for work on May 29, his next scheduled workday, he informed Inventory Manager Whaley he had attempted to call in, and he gave Arrington a doctor's report on the May 25 absence.

Whaley testified that Smith came to the facility early in the day on May 25 to pick up his check, which was in Whaley's office. He claimed Smith took the check, shook his hand, and stated: "I'll see you after while, boss." He claimed Smith did not report for work on the second shift, and did not call to report that he would be absent. Whaley indicated that the incident caused him to give Smith a verbal warning (R. Exh. 6).

Smith testified he could not recall whether he visited the facility on May 25 to pick up his check. He indicated he had arranged for direct deposit of his check around the time under discussion and he may have received pay for that period by direct deposit. He admitted during cross-examination that his affidavits given during the investigation failed to indicate he had called in to report his intended absence on May 25.

Carter Grey credibly testified, when called as a witness for Respondent, that Respondent's payroll records reveal that Smith first received direct deposit of his paycheck on June 8, 1990. I credit Whaley's claim that the employee picked up his check in Whaley's office on May 25 and told Whaley at the time that he would see him later. As Smith was less than forthright regarding the check matter, I credit Whaley's claim that the employee did not call in before the start of his scheduled worktime to report that he would be absent. I do not credit Smith's claim that he called in at some unstated time.

Contrary to General Counsel's contention, I find that Smith was issued a verbal warning on May 29 for cause, rather than because he supported the Union or engaged in other protected activity.

#### June 4, 1990 Written Warning

Smith did not report for work on Saturday, June 2, 1990, which was a scheduled workday. He testified he told his foreman, Arrington, the preceding Thursday that he would not be at work on Saturday because he had an important union meeting he had to go to. Smith admitted Arrington told him he may be written up, and that Arrington asked if he would not come in. Smith told the supervisor he just could not come in because he had something else to do.

On June 4, 1990, Arrington gave Smith a written warning noting that he had received a verbal warning for unexcused absence on May 29, and had experienced a second unexcused absence on June 2.

I find that General Counsel has failed to prove that Respondent unlawfully gave Smith a written warning on June 4, 1990.

#### Cellus Perry

Perry, who like Smith worked the second shift, did not report for work on Saturday, June 2, 1990, a scheduled workday. The employee testified that when his supervisor, Arrington, told him on the Thursday preceding June 2 that Saturday would be a scheduled workday, he told Arrington

he was not going to be able to work that Saturday because his wife's mother was sick and they had made plans for him to take her to see her mother that Saturday. Perry admits Arrington told him, if he missed work that Saturday, he was going to get an unexcused absence.

Arrington admitted during his testimony that Perry told him on the Thursday preceding June 2 that he would not be at work on June 2. He claimed the employee simply gave as a reason that he had prior commitments.

On June 4, 1990, Perry was given a verbal warning because he did not work on June 2 (G.C. Exh. 8). The second page of the warning indicates Perry's explanation for his prior commitments was that he had to take his wife to visit her ill mother; that "We feel that other arrangements could have been made and that Cellus could have attended work."

In sum, Perry was advised prior to June 2 that if he failed to work that day he would be given an unexcused absence. I conclude General Counsel has failed to prove that Respondent unlawfully disciplined Perry for missing work on June 2.

#### June 25, 1990 Written Warning

The record reveals that Saturday, June 23, 1990, was a scheduled workday at the facility. Perry did not work that day because he "just wasn't able to make it in." On June 25, 1990, he was given a written warning which noted that he had received a verbal warning for unexcused absence on June 2, 1990; that he did not show up for work on June 23, and he did not call in to inform anyone that he would be absent (R. 36(t)). Perry refused to sign the written warning, allegedly because he felt overtime was voluntary rather than mandatory.

The above facts fail to reveal that Respondent unlawfully disciplined Perry on June 25, 1990, by giving him a written warning.

#### July 9, 1990 3-Day Suspension

Saturday, July 7, 1990, was a scheduled workday at the facility. Perry credibly testified he informed his immediate supervisor, Harpell, that he was not going to work that Saturday because his vacation was to start on Monday, July 9. Harpell told the employee he should discuss the matter with Willie Thomas. The employee testified that he phoned Thomas at about 1:45 p.m. on July 7 to let him know that he was not coming in, and that his vacation started Monday. Thomas asked Perry if he could come and see him on Monday. The employee agreed he could. Perry testified, without contradiction, that Inventory Manager Whaley had told him and some other employees, including Donald Whitney, at an earlier time that they could elect to not work on Saturday if their vacation was scheduled to begin the following Monday.

On Monday, July 9, Perry went to Thomas' office. Thomas told him he had missed work on Saturday and he would be starting a 3-day suspension on Tuesday because his vacation was canceled. The employee claims he asked who had canceled his vacation, and Thomas stated he wanted to see Billy Arrington about it, and would get back to him later.

Perry testified he had put in for his vacation in April. He requested that it begin on July 4, but was told he could not take it then, but he could the following week.

Perry testified that Thomas never got back to him about the vacation change. When Whaley appeared as a witness, he produced Perry's vacation request document. It reveals his

vacation was scheduled to be taken during the period July 9–13 (G.C. Exh. 30).

In sum, the record clearly reveals that Perry was known by Respondent management to be a union adherent well in advance of July 7, 1990; that Respondent harbored antiunion animus and that fact had been communicated to Perry by, *inter alia*, his Supervisor Harpell; that the employee had been informed by Whaley, his departmental boss, that employees could elect to not work on Saturday if their vacation started on Monday; and that Perry was suspended for 3 days because he exercised what he felt was his right to refuse to work on Saturday, July 7, because his vacation was scheduled to begin on Monday, July 9, 1990. By establishing the facts set forth, I find General Counsel established that Perry's participation in union activities was a motivating factor in Respondent's decision to suspend him for 3 days on July 9, 1990.

Respondent defended its decision to suspend Perry for 3 days on July 9, 1990, by causing Thomas to give his version of the incident. Thomas testified that Perry called him at a time he could not recall on July 7 to indicate he had tickets to a Louis Farrakahn show and did not intend to work that day. He claims he told the employee he was sorry he had purchased the tickets, but he was expected to work that day. Continuing, Thomas testified that the following Monday they discussed Perry's reasons for not coming to work in the facility manager's office. Carter Grey was then serving as interim manager of the facility. He indicated Perry said his reason was because he had the tickets, and that he had scheduled his vacation. Thomas claimed he investigated Perry's vacation claim by discussing it with his foreman, Harpell. He claimed Harpell told him Perry had requested to have his vacation changed. Thomas testified that Grey decided Perry should be charged with an unexcused absence and that he should be suspended for 3 days, commencing the next day. Thomas indicated he did not ask Harpell if Perry had filled out a vacation request form, and he did not ask to see the form. Thomas did not recall whether Grey called Harpell in to question him about Perry's vacation change.

When Grey appeared as a witness for Respondent, he merely indicated that, after looking at records, he felt the appropriate discipline for Perry was a 3-day suspension.

In sum, the record reveals that Cellus Perry was treated in disparate fashion during the incident under discussion. The employee's claim that his departmental manager informed him he could elect not to work the Saturday preceding a vacation scheduled to begin on Monday was not rebutted. Moreover, the record reveals Respondent failed to investigate Perry's vacation claim adequately, as attested by the fact that his vacation request submission reveals he was scheduled to be on vacation from July 9 to 13, 1990. I find Respondent has failed to sustain its evidentiary burden of showing that Perry would have suffered cancelation of his scheduled vacation, and would have been suspended for 3 days on July 9, 1990, even in the absence of his participation in protected conduct.

#### Donald Whitney

Donald Whitney did not attend the hearing in the instant case. Accordingly, the record contains no evidence which would reveal his union sentiments or activities, and it con-

tains no evidence which would reveal Respondent knew or suspected that he was a union adherent.

General Counsel's Exhibits 2, 2(a), (b), and (c) reveal, *inter alia*: that Whitney was hired by Respondent on January 22, 1990; that as of June 11 he had been absent eight times (three excused and five unexcused); that he received a verbal warning on May 8 for unexcused absences on May 2 and 8; and that he received a written warning and a 3-day suspension for excessive absences and unexcused absences on June 22.

While General Counsel contends that Respondent's failure to discipline Whitney for his May 30 and June 11 unexcused absences prior to June 22 reveals the employee was ultimately disciplined because inventory department employees were engaged in union activity, Whaley testified the discipline was not administered in timely fashion because Whitney's foreman negligently failed to do his job. Rick Timmons, Whitney's foreman, corroborated Whaley's testimony by indicating he simply put a note in Whitney's file rather than a writeup on some occasions, and Whaley eventually told him to document Whitney's absences because other employees were complaining that he was receiving favorable treatment.

In sum, the record reveals employee Whitney had a very poor attendance record, and it fails to reveal that he engaged in union activities or other protected conduct. Accordingly, I find that General Counsel has failed to prove that Whitney was disciplined on June 22, 1990, because he engaged in union activities or other protected activity.

#### Antonio D. Hill

Antonio D. Hill was hired by Respondent in January 1990. He was then employed at the Brooklyn Boys Club; his job at Respondent was a second job. At the time of the hearing he was still employed at the Brooklyn Boys Club.

Hill missed considerable work at Respondent while employed at the facility. He candidly admitted during his testimony that he was often just too tired to report for work in Respondent's inventory department after putting in a full day at his primary job. To avoid unexcused absences, he would go to a doctor, voice a complaint, and obtain a doctor's excuse.

Hill indicated that while he was employed at Respondent he had several supervisors, including Harpell, Timmons, and Donald Ficklin. As revealed by General Counsel's Exhibit 11(f), Foreman Harpell prepared a Work Missed Report on June 15 which noted that Hill was given an unexcused tardy on that date when he arrived late for work without calling in to indicate he would be late. The report indicated Hill's excuse was that he had gotten a flat tire on the way to work. Thereafter, on August 26, Hill was absent from work. His supervisor, Donald Ficklin, excused the absence when Hill claimed car trouble caused the absence (G.C. Exh. 11(d)). The following day, Billy Arrington, Ficklin's superior, reclassified Hill's August 26 absence from excused to unexcused and prepared a written warning advising Hill that any further work miss could subject him to discipline, including a suspension (G.C. 11(a)).

Review of the record reveals that Arrington uniformly treated employee absences due to car trouble and/or lack of transportation to be unexcused during the general period under discussion (i.e., G.C. Exh. 15(j))—Antonio J. Hill on

May 16, 1990; G.C. Exh. 36—Whitney on May 9, 1990; G.C. Exh. 17—James Beaver on December 21, 1990). Accordingly, as the record fails to reveal Hill was treated in disparate fashion when he was disciplined on August 28, 1990, I find General Counsel has failed to prove the discipline was administered for unlawful reasons.

#### Curtis Wright

Curtis Wright was hired by Respondent in January 1990. On May 8, Timmons, Wright's foreman, prepared a Work Missed Report noting that Wright had been charged with an unexcused absence because he did not work on May 6, and he failed to call in before his scheduled worktime. As revealed by Respondent's Exhibit 28(b), Timmons and Wright had an argument about the classification of the May 6 absence on May 7. Timmons sent the employee home, and issued him an oral warning. As revealed by Respondent's Exhibit 28(a), Wright was absent from work on May 28, and he called in about an hour after his shift started, claiming he had called earlier but could not reach anyone. The absence was classified as unexcused, and on June 13, the employee was given a written warning for the May 28 unexcused absence as well as excessive excused absences. On June 20, Wright and other inventory department employees were informed that Saturday, June 23, would be a scheduled workday. Wright informed his foreman, Harpell, that he would not be at work on June 23 because he had prior commitments. Harpell informed the employee he could be considered unexcused. On the evening of June 22, Wright contacted Inventory Manager Whaley to inform him he had a severe sinus condition and would not work June 23. He was asked to bring a doctor's excuse when he next reported for work. On June 24, Wright reported for work, but did not bring a doctor's excuse. Instead, he told Supervisor Timmons he had received medication from a nurse. Timmons classified the absence as unexcused and Wright was given a 3-day suspension (R. Exh. 32(a) through (d)).

The record fails to reveal that Respondent was aware of Wright's union sentiments until he wore a union button to work during July 1990. Noting that Respondent appears to have adhered to its progressive discipline system when disciplining Wright, I find General Counsel has failed to prove that Respondent violated the Act when issuing Wright a written warning on June 13, 1990, or when it suspended him for 3 days on June 25, 1990.

#### Antonio J. Hill

Antonio J. Hill was hired by Respondent in November 1989. During the union organization campaign, he attended union meetings and closely associated with Leon Smith and Cellus Perry. He ate lunch with the named employees, and rode to work with them. On April 5, 1990, Hill was suspended for 3 days because he and another employee had been observed racing forklifts at the facility (G.C. Exhs. 15(a) and (b)). On May 16, he was excused from work to see a doctor. He called in on May 17 to state he was in jail. He failed to report or call in on May 18 and his absence was classified as unexcused. During the week of June 12, Hill missed work to attend court proceedings. While he documented his court appearances, the work missed was classified as unexcused as he was charged with theft under \$500, and

was fined. On June 22, he was suspended for 3 days for "attendance and substandard work performance including safety violations" (G.C. Exh. 15(g)).

Noting that the record contains no direct evidence of Respondent knowledge of Hill's limited participation in union activities and the further fact that it appears Respondent simply applied its progressive discipline policy in Hill's situation, I find General Counsel has failed to prove that Respondent suspended the employee for 3 days on June 22 for unlawful reasons.

#### 5. The July 10, 1990 terminations

On July 10, 1990, Respondent's interim plant manager, Grey, terminated the employment of employees Donald Whitney and Leon Smith. As indicated, *supra*, Whitney did not attend the hearing to give testimony. Moreover, the record fails to reveal that Whitney engaged in union or other protected activities, and it fails to reveal that Respondent suspected the employee had engaged in protected conduct. Accordingly, I find that General Counsel has failed to establish, *prima facie*, that Whitney was terminated because he engaged in activities protected by the Act. The Smith termination is discussed below.

Leon Smith was hired by Respondent on January 22, 1990. As indicated, *supra*, he initiated and guided the union organization campaign at Respondent's facility, and Respondent was fully aware of his union advocacy. Corporate Representative Familla told the employee on June 14 that he respected him for his activities, but if he should cross the line, he would get rid of him.

I have found, *supra*, that Smith was given an oral warning for absenteeism on May 29, and he was given a written warning for absenteeism on June 4. While General Counsel contends those warnings were unlawful because Respondent decided to "crack down" on employees in the inventory department once it learned they were engaged in union activities, I have found that supervision in the department were told to more strenuously enforce attendance rules before Respondent became aware of union activity at the facilities. Moreover, having considered the facts surrounding the discipline imposed on Smith on May 29 and June 4, I have concluded the record fails to reveal that discipline was administered for unlawful reasons.

On July 6 and 7, 1990, a Friday and Saturday, Smith did not work. He testified that he called Foreman Billy Arrington on July 6 at 12:30 to tell him that he would be late because he was going to the Board. He indicated Arrington said "okay, thanks for calling." Subsequently, at about 5:45 p.m., Smith claims he called the facility again and told Arrington that he would not be in because he had hurt his back. Smith also failed to work on Saturday, July 7. He testified he called in at 1:45 p.m. and asked to speak with Foreman Harpell, but Harpell failed to answer the page. He then asked to speak with Willie Thomas. When Thomas came on the line, he told him he would not be in because his back was still hurting him. The employee indicated Grey was also on the line, and Grey told him to bring a doctor's statement when he came in. Smith testified that when he reported for work on July 10, Arrington told him to go see Grey. He claimed that when he went to Grey's office, Willie Thomas was there and he told him he was giving him 3 days off for being off

Friday, and as he called in 3 minutes late on Saturday, he was terminated.

While Smith was subjected to two forms of discipline for 2 consecutive days of absence which Respondent classified as unexcused, General Counsel established that consecutive days of unexcused absence of employees normally resulted in the imposition of only one form of discipline. Thus, General Counsel's Exhibits 4(a) and (b) reveal that inventory department employee Donald Whitney had unexcused absences on May 2 and 8, 1990, and the discipline imposed for the 2 consecutive days of absence was issuance of a written warning (see also R. Exh. 36(i)). Similarly, General Counsel's Exhibit 14(f) reveals that inventory department employee Stanley Hill experienced unexcused absences on January 2, 3, and 4, 1990, and the discipline imposed was a 3-day suspension. Additionally, General Counsel's Exhibits 15(d), (e), (g), and (j) reveal that inventory department employee Antonio J. Hill experienced unexcused absences on May 16, 17, and 18, 1990, and the discipline imposed was a 3-day suspension.

Assuming, arguendo, Smith's absences on July 6 and 7, 1990, were properly classified as unexcused, it is clear that the employee was treated in disparate fashion. As the employee was known by Respondent to be an ardent union supporter and Respondent had indicated a desire to get rid of him, I find that General Counsel has shown the employee's participation in union activity was a "motivating factor" in Respondent's decision to terminate him.

Respondent defended the decision to discharge Smith through testimony given by Arrington, Thomas, and Grey. Arrington testified Smith called him prior to his 2 p.m. starting time on July 6 to state that he was at the Board to give testimony and would report for work as soon as he finished giving testimony. In a note to Smith's personnel file, Arrington indicated "at 6:00 p.m. Leon hadn't come to work" (R. Exh. 36(a)).

Grey testified that Arrington reported to him on July 6 that Smith had called in to indicate he may be a little late because he was going to the Board to testify. He claimed he assumed Smith was going to the Labor Board, and as they had some fairly significant processing needs, he phoned the Labor Board to see how late Smith would be. He claims the secretary and could not locate Smith and although he left word for Smith to call him, he did not hear from Smith on July 6. He testified that at 2 or 2:05 p.m. on July 7, Smith called Willie Thomas and the call was taken on a conference line as he and Thomas were in the plant manager's office. According to Grey, the employee informed them he would be unable to work that day because his back was hurting him. Grey testified Smith originally sought to convey the impression the back injury was work-related, but he then indicated it was not work-related. Grey testified he told the employee to bring a doctor's statement and the name of a person he spoke with at the Board when he reported for work. After Smith indicated during the hearing that he visited the school board on July 6 for the purpose of seeking to cause his son to be admitted to summer school, Grey denied that he learned, before the hearing, that Smith had visited the school board rather than the NLRB.

While Smith testified that Thomas was the individual who informed him of his termination, Grey claimed he terminated the employee. He testified his reasons were: that he felt

Smith had been less than honest when indicating he would be a little late on July 6; that he suspected Smith was fabricating a back injury; and that his review of Smith's personnel file caused him to determine that Smith's actions were grounds for termination under Respondent's policy of discipline for absenteeism and tardiness. Grey admitted he did not ask Smith to produce a doctor's statement or ask him for the name of a person he spoke with at the Board when he terminated him. During the hearing, Smith testified he hurt his back moving a tire at home after work on July 5. General Counsel did not offer a doctor's statement to verify his claim. Respondent placed in evidence (R. Exh. 36(d)) a Tennessee Department of Employment Security Agency Decision, which reveals Smith was denied immediate benefits because it determined he was discharged for "Work-Related Misconduct."

Noting that Respondent made no effort to justify its decision to treat Smith's July 6 and 7 absences as two incidents rather than one as it had when inventory department employees Stanley Hill, Donald Whitney, and Antonio J. Hill were absent for consecutive days, it is clear, and I find that Smith was treated disparately when Grey decided the discipline for the July 6 absence should be a 3-day suspension, and the discipline for the July 7 absence should be discharge. Moreover, as Grey failed to give Smith the opportunity to explain where he was on July 6, and he failed to accord the employee an opportunity to produce a doctor's statement to verify his claimed back problem, I infer that Grey did not give the employee an opportunity to justify his July 6 and 7 absences because he wished to rid Respondent of the leading union adherent in the facility.

For the reasons stated, I find that Respondent has failed to show that it would have terminated Smith on July 10, 1990, in the absence of his participation in union activities. I find that by terminating Leon Smith, Respondent violated Section 8(a)(3) and (1) of the Act as alleged.

#### 5. The September 13 terminations

Bodanza claimed during his testimony that starting in July 1990, Respondent's business dropped off and by September it was off 30-35 percent. He testified the decline in business caused him to decide that supervision as well as the work force should be reduced. To effectuate a reduction, he claims he told the foremen to review the discipline and absentee records of employees and to submit names of employees who should be discharged to him. He indicated that originally 14 names were submitted, but he felt that number was too large, and that eventually he decided the number to be separated should be 7. Bodanza indicated he reviewed the personnel files of the employees chosen by the foremen and decided, after considering the absenteeism and discipline experienced by employees Antonio D. Hill, Antonio J. Hill, Cellus Perry, Stanley Hill, Curtis Wright, and Charles Morse, to discharge them on September 13, 1990. With respect to supervision, he claimed he decided Respondent could reduce supervision by approximately one-half. He then decided that Supervisors Timmons, Bobby Wagner, and Whaley, who had been designated as special projects officer, would be terminated.<sup>8</sup>

General Counsel does not contest Respondent's claim that Respondent decided to reduce its supervisory and non-

<sup>8</sup>Foreman Harpell had been discharged in July 1990.

supervisory work force for economic reasons on or about September 13, 1990. Instead, he contends the record reveals Respondent more strenuously enforced its absentee and tardiness policies after learning its employees were engaged in union activities, and that as absences and discipline during the period late May through August 28, 1990, were viewed to determine who should be terminated pursuant to the September reorganization and consolidation of operations, the selection process was tainted. Accordingly, as the discipline imposed was unlawful, General Counsel contends the terminations were unlawful. As indicated above, I find General Counsel's overall contention to be without merit. Consequently, I recommend that the allegation that employees Antonio D. Hill, Antonio J. Hill, Stanley Hill, Curtis Wright, and Charles Morse were terminated for discriminatory reasons on September 13, 1990, be dismissed. With respect to employee Cellus Perry, I reach a different conclusion for the reasons set forth below.

As indicated, *supra*, I have found that Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined employee Perry for his July 7, 1990 absence on July 9, 1990. Bodanza's testimony reveals that the unlawful discipline experienced by Perry on July 9 was a factor which was considered when he was terminated on September 13, 1990. Respondent did not seek to show that it would have terminated Perry on September 13, 1990, even in the absence of the discipline imposed upon the employee on July 9, 1990. Accordingly, the un rebutted record evidence reveals that the employee's participation in union activities led to his termination on September 13, 1990. In the circumstances described, I find that by terminating Perry on September 13, 1990, Respondent violated Section 8(a)(3) and (1) of the Act as alleged.

#### The Representation Case

The objections filed by the Petitioner in Case 26-RC-7290 which are before me for resolution are:

I. That immediately prior to said election the Employer, through its agents, officers and representatives, engaged in unfair labor practices by the act of discharging two employees in the event that they voted to elect Petitioner as bargaining representative, which conduct interfered with and restrained the employees in their free choice of a bargaining representative.

II. That immediately prior to said election the Employer, through its agents, officers and representatives, engaged in unfair labor practices by the acts of suspending one employee in the event that he voted to elect Petitioner as bargaining representative, which conduct interfered with and restrained the employees in their free choice of a bargaining representative.

III. That immediately prior to said election the Employer, through its agents, officers and representatives, engaged in unfair labor practices by the Act of threatening to cease operations if the Union "came in" and to close the facility in the event that they voted to elect Petitioner as bargaining representative, which conduct interfered with and restrained the employees in their free choice of a bargaining representative.

IV. That immediately prior to said election the Employer, through its agents, officers and representatives, engaged in unfair labor practices by the act of threatening loss of bene-

fits if they voted to elect Petitioner as bargaining representative, which conduct interfered with and restrained the employees in their free choice of a bargaining representative.

VI. That immediately prior to said election the Employer, through its agents, officers and representatives, engaged in unfair labor practices by the act of holding "impromptu captive audience" meetings within 24 hours of conduct of ballot, which conduct interfered and restrained the employees in their free choice of a bargaining representative.

XI. That immediately prior to said election the Employer, through its agents, offices and representatives, engaged in unfair labor practices by the act of its management consultants posing as a Laidlaw employee (Tricil Environmental Management, Inc.) promising better benefits, wages, and preferential treatment, which conduct interfered with and restrained the employees in their free choice of a bargaining representative.

Comparison of the objections with the complaint allegations reveals that the following objections are coextensive with the complaint allegations as follows:

<i>Objection</i>	<i>Complaint Paragraph</i>
1	15, 16
2	14, 16
3	7(a), (b), (c), (f), 12
4	9, 13
11	8

Having found that Respondent discharged employees Leon Smith and Cellus Perry in violation of Section 8(a)(3) and (1) of the Act on July 10 and September 13, 1990, respectively, I find Objection 1 to be meritorious.

Having found that Cellus Perry was suspended for 3 days by Respondent on July 9, 1990, in violation of Section 8(a)(3) and (1) of the Act, I find Objection 2 to be meritorious.

Having found that Respondent, acting through Willie Thomas, threatened employees with plant closure if they selected the Union as their bargaining agent on July 10 and 24, 1990, in violation of Section 8(a)(1) of the Act, I find Objection 3 to be meritorious.

Having found that General Counsel failed to prove the allegations set forth in paragraphs 8, 9, and 13 of the complaint, I find Objections 4 and 11 to be without merit.

Objection 6 is related to but is not coextensive with paragraph 12 of the complaint, which alleges, in substance, that Willie Thomas unlawfully threatened employees with plant closure on August 9, 1990. As revealed, *supra*, Thomas testified that shortly before 2 p.m. on August 9, 1990, second shift employees Willie Murrell, Patricia Miller, and Perry Woodears entered his office without invitation. Employee Murrell testified Thomas told the employees he did not want them to vote for the Union, and he said the plant could close if the Union came in. Murrell's testimony was not corroborated by employees Miller or Woodears, and the plant closure testimony was given after General Counsel led the witness. Thomas denied Murrell's version of the conversation. He testified the employees voiced complaint that they were being called and visited at home, and he claimed he simply told them to hang in there and vote tomorrow and it would all be behind them.

I have credited Thomas rather than Murrell with respect to the context of the conversation, and I credit Thomas' claim

that he did not invite the employees to his office on August 9, 1990. Accordingly, I find Objection 6 to be without merit.

Having found Objections 1, 2, and 3 to be meritorious, I find that by: discharging the leading union adherents Smith Perry on July 9 and September 13, respectively; suspending Perry for engaging in union activities on July 9; and by threatening employees with plant closure during the critical period preceding the August 10, 1990 election, Respondent interfered with the employees' exercise of a free and untrammelled choice in the election. Accordingly, I recommend that the August 10, 1990 election be set aside and that a second election be conducted.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with plant closure if they selected the Union as their bargaining agent, Respondent violated Section 8(a)(1) of the Act.

4. By suspending employee Cellus Perry for 3 days on July 9, 1990, and by discharging employee Leon Smith on July 10, 1990, and employee Perry on September 13, 1990, because said employees engaged in union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. Respondent has not violated the Act except as expressly indicated in this decision.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended employee Cellus Perry on July 9, 1990, and that it unlawfully terminated employees Leon Smith on July 10, 1990, and Cellus Perry on September 13, 1990, I recommend that Respondent be ordered to offer both employees immediate reinstatement to their former or substantially equivalent positions of employment and that it be ordered to make them whole for the discrimination practiced against them for any losses of wages and benefits, less interim earnings, with backpay to be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, Tricil Environmental Management, Inc., Millington, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Threatening employees with plant closure if they select the Union as their collective-bargaining agent.

(b) Discouraging employees from joining, supporting, or engaging in activities on behalf of Oil, Chemical and Atomic Workers International Union, AFL-CIO or any other labor organization, by suspending or discharging employees because they engage in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees Leon Smith and Cellus Perry immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make them whole for the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) Expunge from its records any reference to the July 9, 1990 layoff of Cellus Perry and all references to the unlawful discharges of Cellus Perry and Leon Smith, and notify them that this is being done and that the referenced layoff and the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all subcontracts, bills, invoices and other documents relating to its transportation functions and all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under and to facilitate compliance with this Order.

(d) Post at its Millington, Tennessee facility copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>10</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with plant closure if they select the Union as their collective-bargaining agent.

WE WILL NOT discourage employees from joining, supporting, or engaging in activities on behalf of Oil, Chemical and Atomic Workers International Union, AFL-CIO or any other labor organization, by suspending or discharging employees because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employees Leon Smith and Cellus Perry immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice

to their seniority or other rights and privileges, and make them whole for the discrimination practiced against them.

WE WILL expunge from our records any reference to the July 9, 1990 layoff of Cellus Perry and all references to the unlawful discharges of Cellus Perry and Leon Smith, and notify them that this is being done and that the referenced layoff and the discharges will not be used against them in any way.

TRICIL ENVIRONMENTAL MANAGEMENT, INC.